

BORALASKIN LAW LIBRARY  
3 1761 06093795 0



UNIVERSITY OF TORONTO  
FACULTY of LAW  
Internationally Trained Lawyers Program

# Canadian Constitutional Law (ITLP301)

## CASEBOOK – Volume 1

Instructors:

Michael Doi & Debra McAllister

STORAGE

KE  
4219  
.D63  
2013  
v.1

2013-2014



Canada

ITLP  
Internationally Trained Lawyers Program



Digitized by the Internet Archive  
in 2018 with funding from  
University of Toronto

<https://archive.org/details/canadianconstitu01doim>



UNIVERSITY OF TORONTO  
FACULTY OF LAW

Internationally Trained Lawyers Program

# **Canadian Constitutional Law (ITLP301)**

## **CASEBOOK – Volume 1**

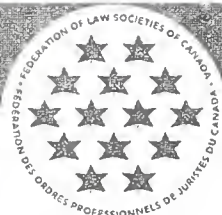
**Instructors:**

**Michael Doi & Debra McAllister**

2013-2014

	<b>Table of Index for Canadian Constitutional Law</b>	
<b>Item #</b>	<b>Item Name</b>	<b>Page #</b>
		<b>Volume 1</b>
1	Canadian Constitutional Law NCA Syllabus (Revised May 2011)	1-9
2	<i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217.	10-54
3	<i>Canadian Western Bank v Alberta</i> , [2007] 2 SCR 3.	55-104
4	<i>Quebec (Attorney General) v. Canadian Owners and Pilots Association</i> , [2010] 2 SCR 536.	105-126
5	<i>Rothmans, Benson &amp; Hedges Inc. v. Saskatchewan</i> , [2005] 1 SCR 188.	127-135
6	<i>Citizens Insurance Co. v. Parsons</i> , (1881) 7 AC 96 (PC).	136-155
7	<i>Reference re Securities Act (Canada)</i> , 2011 ABCA 77.	156-196
8	<i>General Motors of Canada Ltd. v City National Leasing</i> , [1989] 1 SCR 641.	197-229
9	<i>Reference re Anti-Inflation Act</i> , [1976] 2 SCR 373.	230-290
10	<i>R. v. Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401.	291-326
11	<i>Margarine Reference (Reference re Validity of Section 5 (a) Dairy Industry Act)</i> , [1949] SCR 1.	327-387
12	<i>Reference re Assisted Human Reproduction Act</i> , 2010 SCC 61.	388-485

Table of Index for Canadian Constitutional Law		
Item #	Item Name	Page #
		Volume 1
1	Canadian Constitutional Law NCA Syllabus (Revised May 2011)	1-9
2	<i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217.	10-54
3	<i>Canadian Western Bank v Alberta</i> , [2007] 2 SCR 3.	55-104
4	<i>Quebec (Attorney General) v. Canadian Owners and Pilots Association</i> , [2010] 2 SCR 536.	105-126
5	<i>Rothmans, Benson &amp; Hedges Inc. v. Saskatchewan</i> , [2005] 1 SCR 188.	127-135
6	<i>Citizens Insurance Co. v. Parsons</i> , (1881) 7 AC 96 (PC).	136-155
7	<i>Reference re Securities Act (Canada)</i> , 2011 ABCA 77.	156-196
8	<i>General Motors of Canada Ltd. v City National Leasing</i> , [1989] 1 SCR 641.	197-229
9	<i>Reference re Anti-Inflation Act</i> , [1976] 2 SCR 373.	230-290
10	<i>R. v. Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401.	291-326
11	<i>Margarine Reference (Reference re Validity of Section 5 (a) Dairy Industry Act)</i> , [1949] SCR 1.	327-387
12	<i>Reference re Assisted Human Reproduction Act</i> , 2010 SCC 61.	388-485
		Volume 2
1	<i>R v Van der Peet</i> , [1996] 2 SCR 507, per Lamer C.J., paragraphs 1-94.	1-89
2	<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010.	90-161
3	<i>Haida Nation v British Columbia (Minister of Forests)</i> , [2004] 3 SCR 511.	162-179
4	<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624, paragraphs 19-52.	180-217
5	<i>Greater Vancouver Transportation Authority v Canadian Federation of Students</i> , [2009] 2 SCR 295, paragraphs 13-24.	218-253
6	<i>Ford v Quebec (Attorney General)</i> , [1988] 2 SCR 712, Part V of the Court's opinion, paragraphs 23-36.	254-302
7	<i>R v Oakes</i> , [1986] 1 SCR 103, per Dickson C.J., Part V of his opinion, paras. 62-79.	303-329
8	<i>Alberta v Hutterian Brethren of Wilson Colony</i> , [2009] 2 SCR 567, per McLachlin C.J. at paragraphs 35-104 and 28-34, per Abella J. at paragraphs 133-176 and 125-132.	330-378
9	<i>Syndicat Northcrest v Amselem</i> , [2004] 2 SCR 551, per Iacobucci J., paragraphs 1-104.	379-442
		Volume 3
1	<i>Reference re Same-Sex Marriage</i> , [2004] 3 SCR 698, paragraphs 47-60.	1-22
2	<i>Montréal (City) v 2952-1366 Québec Inc.</i> , [2005] 3 SCR 141.	23-71
5	<i>Charkaoui v Canada (Citizenship and Immigration)</i> , [2007] 1 SCR 350.	72-120
6	<i>Canada v PHS Community Services Society</i> , 2011 SCC 44, [2011] 3 SCR 134	121-168
7	<i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143.	169-207
8	<i>R v Kapp</i> , [2008] 2 SCR 483.	208-248
9	<i>Withler v Canada (Attorney General)</i> , 2011 SCC 12.	249-278
10	<i>Vriend v Alberta</i> , [1998] 1 SCR 493, per Iacobucci J., paragraphs 129-179.	279-335



Federation of Law Societies of Canada

**National Committee on Accreditation**

# **Syllabus**

# **Canadian**

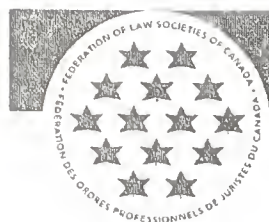
# **Constitutional Law**

**(Revised September 2012)**

**Candidates are advised that the syllabus may be updated from time-to-time without prior notice.**

**Candidates are responsible for obtaining the most current syllabus available.**





## Federation of Law Societies of Canada National Committee on Accreditation

# Canadian Constitutional Law

## SCOPE OF THE COURSE

Constitutional law is distinguished by what it does (it creates the organs of the state and defines and limits their powers) and by its status (it is the supreme law with which all other laws and government actions must comply). The goal of this course is to provide candidates with an introduction to the various components of Canadian constitutional law, and to the basic principles necessary to understanding and applying the provisions of the constitution in legal practice.

The readings begin, in Part I of the course, with an introduction to the nature and sources of the Canadian constitution, followed by an overview of the procedures for amending the constitution, and an introduction to the federal nature of the state and the role of the judiciary in upholding the federal division of legislative powers.

In Part II, the readings explore the federal division of legislative power in sections 91-95 of the *Constitution Act, 1867* in more detail. The readings on federalism begin with an examination of the general principles of interpretation, and then turn to a study of a handful of the most important legislative powers, including the federal powers in relation to "peace, order and good government" [opening language of s.91], "trade and commerce" [s. 91(2)], "criminal law" [s.91(27)], and the provincial power in relation to "property and civil rights" [s.92(13)].

In Part III of the course, the readings examine the rights and freedoms protected by the Canadian constitution, including the rights and freedoms guaranteed by the 1982 *Charter of Rights and Freedoms*. The readings in Part III begin with an examination of the language rights protected by the *Constitution Act, 1867*, the *Charter*, and the *Manitoba Act*. The next topic is the distinct constitutional position of Aboriginal peoples. The readings examine federal and provincial powers to pass laws in relation to Aboriginal peoples and lands, and the Aboriginal and treaty rights entrenched in s.35 of the *Constitution Act, 1982*. The readings then focus on four of the most important rights-conferring provisions of the *Charter* – freedom of conscience and religion [s.2(a)], freedom of expression [s.2(b)], life, liberty and security of the person [s.7] and equality rights [s.15] – as well as the provisions dealing with the application of the *Charter* [s.32], reasonable limits [s.1], the notwithstanding clause [s.33] and remedies [s.24, s.52].

## EXAMINATION

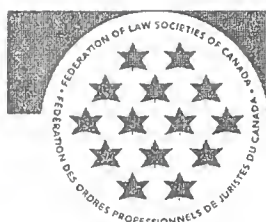
The examination for this course will be a three-hour open book examination. The exam in the course may consist only of problem questions, or it may consist of a mix of problem questions, short answer questions and short essay questions.

A typical problem question will describe an actual or fictional statute (or other government action), and ask candidates to assess whether it is consistent with the provisions of the *Constitution Act, 1867* and/or the *Constitution Act, 1982*, and, if not, what the consequences are likely to be. Problem questions test candidates' ability to identify constitutional issues, accurately state the applicable legal rules, apply those rules to novel situations, and draw conclusions supported by analysis. In other words, problem questions require the exercise of independent judgment grounded in the application of general rules to specific fact situations. For candidates who lack experience writing such exam questions, familiarizing yourself with them through practice is essential. Candidates should practice by testing themselves, using the sample examination and perhaps by reviewing other samples of recent Canadian constitutional law examinations. Many Canadian law school libraries have copies of recent exams on file. In addition, many Canadian law schools make exams available online and some Canadian constitutional law professors have course websites with sample examinations and model answers.

Short answer questions, which may be in a true/false format, test candidates' ability to succinctly and correctly evaluate statements about the content of Canadian constitutional law, as in the following example:

Question: Indicate whether the following statement is true or false, and cite the case listed on the syllabus that best supports your answer: Pursuant to the "general regulation of trade" branch of its power to enact laws in relation to trade and commerce in s.91(2) of the *Constitution Act, 1867*, Parliament may enact a comprehensive regulatory scheme aimed at promoting fair competition in intraprovincial and interprovincial trade.

Answer: True. Relevant case listed on the syllabus: *General Motors v. City National Leasing*.



## Federation of Law Societies of Canada National Committee on Accreditation

Short essay questions test whether candidates' have critically engaged with the material listed in the syllabus and have started to form their own opinions about the strengths and weaknesses of Canadian constitutional law (e.g.: "Would you favour the repeal of s.33 of the *Charter of Rights and Freedoms*?").

### REQUIRED READINGS

The required readings under each topic consist of the applicable provisions of the text of the constitution, leading cases from the Supreme Court of Canada (and a few from other courts), and relevant chapters (or parts of chapters) from the leading English-language textbook on Canadian constitutional law: Peter Hogg, *Constitutional Law of Canada* Student Edition (Toronto: Carswell, published in a revised version annually) (this edition is referred to below as "Hogg").

The case law you are required to read is accessible in case reporters in law libraries – for example, Supreme Court of Canada rulings are reported in the Canadian Supreme Court Reports (S.C.R.). You may access the full text of all court rulings listed below at <http://scc.lexum.org> (for Supreme Court of Canada judgments), or at <http://canlii.org> (for other Canadian court rulings), or at <http://www.bailii.org/uk/cases/UKPC/> (for Privy Council rulings). All of the court rulings listed in the required readings below are hyperlinked to the full text available online.

I recommend that candidates purchase a copy of the 2012 student edition of Professor Hogg's book. The student edition contains all of the chapters from the Hogg book included in the required readings below. Professor Hogg's book is also available in law libraries in a loose-leaf format updated annually. Candidates are advised to use the most recent student edition of the Hogg book (or the loose-leaf version) when completing the readings below, because it will contain the most up-to-date analysis of recent developments. Using a Hogg student edition from 2010 or 2011 is also acceptable, since the content of Canadian constitutional law, and thus of the Hogg textbook, does not change dramatically in a year or two. Using the Hogg student edition that is more than a few years old is not advisable, as you will be missing too many significant new developments in the case law.

Candidates should make regular reference to the texts of Canadian constitutional documents relevant to the topics covered in this course, especially the provisions of the *Constitution Acts* of 1867 and 1982 that are included on the list of required readings below. The key provisions are excerpted in Appendices I and III of the Hogg textbook. The full text of the *Constitution Acts* of 1867 and 1982 can also be found on the Department of Justice website at <http://laws-lois.justice.gc.ca/eng/Const/index.html> and on the website of the Canadian Legal Information Institute at <http://www.canlii.org>. For those who are interested in purchasing a separate volume containing a more comprehensive collection of constitutional documents (it is not necessary to do so), the best volume is B.W. Funston and E. Meehan, *Canadian Constitutional Documents Consolidated* 2d ed. (Carswell, 2007). The Department of Justice also publishes a handy volume entitled *A Consolidation of the Constitution Acts 1867 to 1982*, available for purchase online at <http://www.fedpubs.com/subject/constitution/constitutions.htm>.

Candidates should aim to develop an understanding of the basic principles of Canadian constitutional law that starts with the text of the Constitution Acts and is then deepened and extended by the principles developed through judicial interpretation of the text evident in the leading cases listed on the syllabus.

The Hogg textbook should serve to provide historical context and clear summaries of the law. Candidates are warned against focusing their study exclusively on the readings from the Hogg textbook. While the Hogg book is a marvellous source, it is important to give equal time to the study of the constitutional provisions and the leading judicial decisions listed on the syllabus. The listed cases are leading cases that set out authoritative statements of the content of Canadian constitutional law. The law cannot be derived from a study of the text of the constitution and the Hogg book alone.





## Federation of Law Societies of Canada National Committee on Accreditation

In light of the sparse language of the constitutional text, the bulk of Canadian constitutional law is a product of judicial interpretation set out in the reasons in particular cases or reference opinions. Professor Hogg's book provides reliable summaries of the legal rules emanating from Supreme Court of Canada decisions; your understanding then needs to be extended by a careful reading of the leading cases on each topic. Candidates should be alert to instances where Professor Hogg's views are at odds with judicial opinions or are incomplete because he has not yet updated his book to reflect the latest judicial rulings listed on the syllabus. For example, the 2012 student edition of the Hogg textbook reflects developments up to late 2011; it does not include discussion of the most recent rulings listed in the required readings below (such as the *Reference re Securities Act*, issued in December 2011).

The exam will test knowledge derived from all three sources – from the constitutional provisions themselves, from the case law, and from the Hogg book. An adequate understanding of and capacity to work with Canadian constitutional law requires a knowledge base that is a combination of the constitutional text, the case law and scholarly analysis.

### TOPICS TO BE COVERED AND REQUIRED READINGS

The outline that follows gives the full requirements of the course. All of the required readings are examinable. As described above, the course is divided into three parts: basic concepts, distribution of powers and rights and freedoms.

The references to the chapters in the Hogg textbook below use the chapter numbers from the latest student edition.

### COURSE CONTENT

#### I. BASIC CONCEPTS

##### 1. Sources and Nature of the Constitution

Hogg, chapter 1, "Sources"

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

##### 2. Amending Procedures

*Constitution Act, 1982*, Part V, ss.38-49

Hogg, chapter 4, "Amendment", and chapter 5.7, "Secession"

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

##### 3. Federalism and Judicial Review

*Constitution Act, 1867*, ss.91-95

*Constitution Act, 1982*, s.52

Hogg, chapter 5, "Federalism"



## Federation of Law Societies of Canada National Committee on Accreditation

### II. DISTRIBUTION OF POWERS

#### 4. Principles of Interpretation

Hogg, chapter 15, "Judicial Review on Federal Grounds"

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3

Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 SCR 536

#### 5. Paramountcy

Hogg, chapter 16, "Paramountcy"

Rothmans, Benson & Hedges Inc. v Saskatchewan, 2005 SCC 13, [2005] 1 SCR 188

#### 6. Property and Civil Rights

Constitution Act, 1867, s.92(13)

Hogg, chapter 21, "Property and Civil Rights"

Citizens' Insurance Co. v Parsons, (1881) 7 A.C. 96 (P.C.)

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

#### 7. Trade and Commerce

Constitution Act, 1867, s.91(2)

Hogg, chapter 20, "Trade and Commerce"

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R.641

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837

#### 8. Peace, Order and Good Government

Constitution Act, 1867, s.91 (opening words)

Hogg, chapter 17, "Peace, Order, and Good Government"

Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401

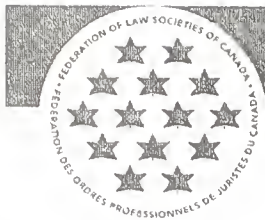
#### 9. Criminal Law

Constitution Act, 1867, s.91(27), s.92(15)

Hogg, chapter 18, "Criminal Law"

Margarine Reference (Reference re Validity of Section 5 (a) Dairy Industry Act), [1949] S.C.R. 1

Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 SCR 457



## Federation of Law Societies of Canada National Committee on Accreditation

### III. HUMAN RIGHTS AND FREEDOMS

#### 10. Language Rights

Constitution Act, 1867, s.133

Manitoba Act, 1870, s.23 (quoted in Hogg, chapter 56, note 40)

Constitution Act, 1982, ss.16-23

Hogg, chapter 56, "Language"

#### 11. Aboriginal and Treaty Rights

Constitution Act, 1867, s.91(24)

Constitution Act, 1982, s.25, s.35

Hogg, chapter 28, "Aboriginal Peoples"

R. v. Van der Peet, [1996] 2 S.C.R. 507, per Lamer C.J., paragraphs 1-94

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511

#### 12. Interpreting the Charter of Rights and Freedoms

Hogg, chapter 36, "Charter of Rights"

#### 13. Application of the Charter of Rights and Freedoms

Constitution Act, 1982, s.32

Hogg, chapter 37, "Application of Charter"

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, paragraphs 19-52

Greater Vancouver Transportation Authority v. Canadian Federation of Students, 2009 SCR 31, [2009] 2 SCR 295, paragraphs 13-24

#### 14. Override of Rights

Constitution Act, 1982, s.33

Hogg, chapter 39, "Override of Rights"

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, Part V of the Court's opinion, paragraphs 23-36

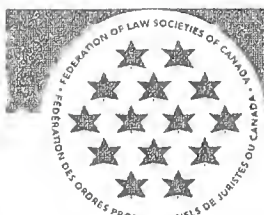
#### 15. Limitation of Rights

Constitution Act, 1982, s.1

Hogg, chapter 38, "Limitation of Rights"

R v Oakes, [1986] 1 SCR 103, per Dickson C.J., Part V of his opinion, paras. 62-79

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, per McLachlin C.J. at paragraphs 35-104, per Abella J. at paragraphs 133-176



## Federation of Law Societies of Canada National Committee on Accreditation

### 16. Freedom of Conscience and Religion

Constitution Act, 1982, s.2(a)

Hogg, chapter 42, "Religion"

Syndicat Northcrest v Amselem, 2004 SCC 47, [2004] 2 SCR 551, per Iacobucci J., paragraphs 1-104

Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698, paragraphs 47-60

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, per McLachlin C.J. at paragraphs 28-34, per Abella J. at paragraphs 125-132

### 17. Freedom of Expression

Constitution Act, 1982, s.2(b)

Hogg, chapter 43, "Expression"

Montréal (City) v 2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 SCR 141

### 18. Life, Liberty and Security of the Person

Constitution Act, 1982, s.7

Hogg, chapter 47, "Fundamental Justice"

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 SCR 350

Canada v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134

### 19. Equality Rights

Constitution Act, 1982, s.15

Hogg, chapter 55, "Equality"

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

R. v Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483

Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396

### 20. Remedies

Constitution Act, 1982, s.24, s.52

Hogg, chapter 40, "Enforcement of Rights"

Vriend v. Alberta, [1998] 1 S.C.R. 493, per Iacobucci J., paragraphs 129-179





## Federation of Law Societies of Canada National Committee on Accreditation

### Canadian Publishers

Carswell-Thomson Professional  
Publishing Canada  
Corporate Plaza  
2075 Kennedy Road  
Scarborough, ON M1T 3V4

Contact: Lisa Marrello (mention the NCA exams)  
Tel: (416) 609-3800 or 1-800-387-5164  
Email: [carswell.customerrelations@thomson.com](mailto:carswell.customerrelations@thomson.com)

Irwin Law Inc.  
14 Duncan St.  
Toronto, ON M5H 3G8

Tel: (416) 862-7690 or 1-888-314-9014  
Fax: (416) 862-9236  
Email: [contact@irwinlaw.com](mailto:contact@irwinlaw.com)

Emond Montgomery  
60 Shaftesbury Ave.  
Toronto, ON M4T 1A3

Tel: (416) 975-3925  
Fax: (416) 975-3924  
Email: [info@emp.ca](mailto:info@emp.ca)

Lexis Nexis Canada Inc.  
(For printed material only  
and not for access to Quicklaw)

Contact: Donna Hurley  
Tel: (905) 415-5823 or 1-800-668-6781 ext. 823  
Fax: (905) 479-4082 or 1-800-461-3275  
Email: [Donna.Hurley@lexisnexis.ca](mailto:Donna.Hurley@lexisnexis.ca)

Canada Law Books  
240 Edward St.  
Toronto, ON L4G 3S9

Tel: (905) 841-6472

### Access to Quicklaw (Internet service of Lexis Nexis)

Please contact the Lexis Nexis Customer Service Department at: [service@lexisnexis.ca](mailto:service@lexisnexis.ca) or call 1-800-387-0899 for a free account once you have paid your examination registration fees. You must provide your NCA File Number which will be used as a student number. You will be able to get an immediate response to requests evenings and on weekends. Customer Service also offers immediate research and/or technical assistance.

### Internet Sites for Provincial Legislation

This is a listing for all the provinces  
and is highly recommended

[www.canlii.org](http://www.canlii.org)

Ontario:  
British Columbia (Queen's Printer):  
Alberta (Queen's Printer):

<http://www.attorneygeneral.jus.gov.on.ca/english/legis/>

<http://www.bclaws.ca/>

<http://www.qp.alberta.ca/>

### Supreme Court Judgments

<http://scc.lexum.org/en/index.html>

